

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4825 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether Their Lordships wish to see the fair copy of the judgement? -
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? -
5. Whether it is to be circulated to the Civil Judge?
-

LN PATEL

Versus

STATE OF GUJARAT

NOTICE TO BE SERVED THROUGH

Appearance:

MR JV BHAIKAVIA for Petitioner

MR PG DESAI, GP WITH MR. VY GHARANIYA,AGP for Respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 27/11/98

ORAL JUDGEMENT

This petition has been filed for a direction to the respondents to consider the petitioner for promotion to the post of Sr. Inspector of Factories, Class-I on the roster point with a deemed date from the year 1985.

2. The petitioner was appointed in the year 1973 as Jr. Inspector of notified Factories, Class-II.

Thereafter, the petitioner was promoted as Jr. Inspector of Factories, Class-II on 31-5-1980. The petitioner belongs to the scheduled tribe community. Hence, his claim for promotion is on the basis of roster point. The Gujarat Factories Inspectorate Class-I (Senior Inspector of Factories) Recruitment Rules, 1966 has provided the procedure for appointment on the post of Sr. Inspector of Factories, either by promotion of the persons on proved merits and efficiency or by direct selection. It was subject to the condition under Rule 3 that for being eligible for promotion, a candidate must have held the post of Junior Inspector of Factories for a period of 5 years and possess a degree or a diploma in Mechanical and/Electrical Engineering from a statutory University or recognized Institution or possess an equivalent qualification recognized by Government. It is submitted by the learned counsel for the petitioner that no scheduled tribe candidate was promoted to the post of Sr. Inspector of Factories, Class-I and hence the petitioner made a representation in the year 1982. The petitioner further made representation on 18-4-1987, 15-5-1987 and 13-7-1987. The petitioner was informed by a letter 8-9-1987 as per the Recruitment Rules the petitioner was required to pass departmental examination. But there was no provision under the aforesaid Rules, 1966 for passing departmental examination. Not a single departmental examination was held till 1976 and not a single scheduled tribe candidate was promoted to the post of Sr. Inspector of Factories, Class-I and the reservation quota was being carried forward. The petitioner being senior most scheduled tribe candidate he was eligible and he ought to have been promoted as soon as he has completed five years service and became eligible in the year 1985. The departmental examination was introduced in the Rules by amendment published on 17-2-1987 which is known as Gujarat Labour Department (Condition of Service relating to Gazetted Officers' Examination) (Amendment) Rules, 1987. Rule 3 requires passing of departmental examination of Gazetted Officer within three chance during the period of three years. The petitioner being a scheduled tribe candidate eligible for promotion as per his seniority on the basis of roster point. But no person was promoted though 12 candidates were promoted to the general category and not a single scheduled tribe candidate was promoted during period from 1976 to 1987. When there was no provision for passing departmental examination for eligibility of Sr. Inspector of Factories, Class-I. Under the new Recruitment Rules, 1987 the respondents decided to hold departmental examination on 28-9-1987. The petitioner also appeared in that departmental examination held on 28-9-1987.

3. The petitioner passed the departmental examination on 14-7-1988 in the first attempt when resolution was declared. As such the petitioner is entitled for promotion on the basis of roster point.

4. In affidavit-in-reply filed by Shri D.V. Solanki it was admitted in paragraph no. 4 that the petitioner was promoted as a Jr. Inspector of Factories on 31-5-1980 from the post of Inspector of Notified Factories and he belonged to scheduled tribe community. Under the Recruitment Rules in order to be eligible for promotion to the post of Sr. Inspector of Factories the candidate must have held the post of Jr. Inspector of Factories for a period of 5 years. The petitioner has become eligible for promotion in June, 1985. It is also asserted that S.R. Bodar who belongs to scheduled tribe community was promoted as Sr. Inspector of Factories by the Government resolution dated 31-8-1980. But because of his direct selection by Gujarat Public Service Commissioner (GPSC) as Sr. Inspector of Factories he was appointed by the notification dated 27-10-1980. A table has been shown in para 7 that Shri B.N. Mehta was appointed on the vacancy reserved for scheduled tribe candidate at Sr. No. 1. While Shri S.R. Bodar though he belonged to scheduled tribe candidate was appointed on the vacancy of general category. As per the Government Circular dated 22-11-1984 the officer who has not passed the departmental examination should not be considered for promotion. Hence, the petitioner should not be promoted.

5. Heard learned Government Pleader Mr. P.G. Desai. Yesterday, one affidavit was filed by Shri V.D. Nayak, Dy. Secretary, Labour and Employment Department, who asserted wrong facts without verifying the facts stated in earlier affidavit-in-reply for which I was intending to take legal action against him but the learned Government Pleader requested to apologize him and he undertook to file unconditional apology.

6. It is undisputed fact that the Departmental Rules provide ratio of selection of the Sr. Inspector of Factories by promotion and direct recruit is 1:1. The list of 17 persons was supplied day before yesterday by the learned Asstt. Govt. Pleader Mr. V.B. Gharaniaya, which reads as under :

Sr.	Name of person	Category	

1.	Shri C.D. Goretala	Promoted Dt.14.4.70	General

2. Shri J.B. Shah	"	Dt.2.8.71	"
3. Shri M.B. Trivedi	"	Dt.12.3.73	"
4. Shri I.K. Patel	"	Dt.12.3.73	"
5. Shri C.P. Patel	"	Dt.12.3.73	"
6. Shri A.D. Dhimar	"	Dt.12.3.73	"
7. Shri B.M. Mehta	"	Dt.25.5.76	"
8. Shri V.B. Patel	"	Dt.25.5.76	"
9. Shri H.J. Patel	"	Dt.25.2.80	"
10. Shri K.U. Mistry	"	Dt.25-2-80	"
11. Shri R.M. Mistry	"	Dt.3.6.80	"
12. Shri S.R. Bodar	Direct	Dt.13.11.80	S.T.
13. Shri B.P. Parmar	Promoted	Dt.8.12.81	S.C.
14. Shri M.D. Joshiyara	Direct	Dt.11.10.82	S.T.
15. Shri C.M. Bhatia	Direct	Dt. Sept. '83.	General
16. Shri J.J. Vaghela	Direct	Dt.22.2.84	General
17. Shri J.M. Patel	Direct	Dt.13.3.85	S.T. on open merit.

7. It appears that 11 persons from general category were promoted during the period from 1972 to 1980. Mr. S.R. Bodar though he was promoted in the stop gap arrangement on the basis of roster point. On his selection through Gujarat Public Service Commission he was treated as a direct recruit and one person namely J.M. Patel who was also appointed as direct recruit though he belongs to scheduled tribe community. He appeared in the examination and he was selected on merits as general category candidate. The contention of the learned advocate for the petitioner is that the petitioner was eligible for promotion in June 1985 and hence he should be promoted with effect from June, 1985 as at that time there was no procedure for promotion on the basis of passing of departmental examination. This departmental examination was introduced from 7-2-1987 and the petitioner has also passed that departmental examination in the first attempt on 14-7-1988. Learned Government Pleader felt difficulty to argue that direct recruitment of S.R. Bodar was made and as to why the petitioner was not given promotion on the basis of roster point. As such learned Government Pleader could not contest the position of the petitioner that even the petitioner was entitled for promotion on 14-7-1988 and was fully eligible for promotion on the basis of roster point and he was entitled for promotion. Learned Government Pleader could not explained any of the circumstances after appointment of S.R. Bodar having been treated as direct recruit on 13-10-80 as to why the petitioner was not promoted on the basis of the roster point.

8. Now let us know the legal position of reservation in promotion and roster. The appointments and promotions have to be made in accordance with roster and in getting roster point required by the Government instructions have to be implemented in the form of running account from year to year. On this subject, the Supreme Court in the case of R.K. Sabharwal Vs. State of Punjab, reported in 1995 (2) SCC 745, has held "when the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. There is no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and not thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. However, in the event of non-availability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner. The decision on this point shall operate prospectively."

9. Ratio of "running account" has been confirmed in the case of Ashok Kumar Gupta Vs. State of U.P., reported in 1997(5) SCC 201. The decision in the case of R.K. Sabharwal and Others Vs. State of Punjab is cited in JT 1995 SC 351 = 1995 (2) SCC 745. The Division Bench reaffirmed that the decision in Mandal's case on promotion was of majority. Obviously, Sabharwal case's ratio has upheld the principle of reservation in promotion and applied "running account" theory put forward by the State to give practically content to equality in results applying roster point earmarked for Dalits. Apart from equal opportunity to them to compete with the general candidates for general posts. The employees from the general sections and Dalit and Tribes are included in the roster system to harmonize the competing interest. Dalit and Tribes selected from promotion on merits in the open competition are not to be treated as part of reserved quota. It is further observed that it would therefore be clear that reservation promotion is constitutional validity, the posts earmarked for Dalits and Tribes shall be filled up and adjusted with them. The Dalits and Tribes selected in the open competition for the posts in general quota should be considered the appointees to the general posts in roster as general candidates. The promotion given in excess of the quota prior to the judgment in Sabharwal's

case should not be disturbed. The Supreme Court has laid down the principle in the case of S.C. & S.T. Officers Welfare Council Vs. State of U.P. reported in AIR 1997 SUPREME COURT 1451, which reads as under :

"It is settled law that the Constitution having given the benefit of reservation and having adopted the policy by the Government, the policy should strictly be adhered to and it should not be made a farce and introducing at the whim of the officers, their own criteria contrary to the general policy. Therefore, it was directed by this Court in State of U.P. Vs. Dr. R.K. Tandon, (1995) 3 SCC 616 : (1995 AIR SCW 2278), in paragraph 6 that the rule of reservation if applied and the candidates were selected, accordingly, their seniority vis-a-vis general candidates should be in accordance with the roster maintained by the State Government. The same was reiterated in State of U.P. Vs. Dr. R.K. Tandon (1996) JT (SC) 174 : (1996 AIR SCW 3546), in paragraph 8 thus :

"Yet another problem that was brought to our notice is that while preparing their inter se seniority and fitment, the Government was not strictly following the rule of roster and reserved for Scheduled Caste, Scheduled Tribes and Backward Class candidates and their placement on the respective vacancies earmarked for them in the roster. It would be obvious that when the Government makes appointments through administrative instructions or statutory rules, the appointment of candidates should be according to the order of merits and roster. The Government should follow the rule of reservation and make appointments as per the roster points. That procedure is also prescribed even in the Ad-hoc Rules. Therefore, even appointments from the lists of 1971, 1977, 1978, 1979 and among those retired from service or had the benefit of Court orders or non-selects, the inter-se seniority should accordingly be determined as per the rule of reservation and roster. Even among the non-selectees when they are appointed on Ad hoc Rules and seniority under Rule 7 thereof is determined the same principle should be followed. There roster points should also be worked out and appointments made accordingly. There shall be direction to follow the procedure so that there will not be any deviation from the rules of appointment, reservation so that and the order of

appointment would become according to rules and remain legal."

10. The aforesaid rule has also been followed in the case of Scheduled Castes and Scheduled Tribes Officers Welfare Council V. State of U.P. (Supra).

11. The Supreme Court in the case of State of Punjab and others Vs. G.S. Gill and other various cases including Madhav's case held that reservation provided to single post on the basis of the rule of rotation is not unconstitutional. The High Court, therefore, was clearly in error in holding that reservation in promotion to a single post and application of carry forward rule and of roster is unconstitutional.

12. The Supreme Court in the case of Syed Khalid Rizvi and others Vs. Union of India reported in 1993 Supp. 3 SCC 575 held that the no employee has right for promotion. But he has right for consideration of his promotion. Whether the promotion is statutory right or constitution right, has been considered by the Supreme Court in the case of Ashok Kumar Gupta and Another Vs. State of U.P. and others reported in 1997 (1) G.L.H. 893, which reads as under :

"In the light of this normal run of service jurisprudence, the question emerges whether the right to promotion is a fundamental right and the direction of prospective operation of the decision in Mandal Judgement, after five years, violate equality enshrined in Arts. 14 and 16 (1) and is void under Article 13(2) of the Constitution ? Right to reservation itself is a fundamental right under Article 16(1) as was laid in State of Kerala Vs. N.M. Thomas (1976 (2) SCC 310, which was reported in Mandal's case.

13. In the case of Ashok Kumar Gupta (Supra) the Supreme Court has held that it would be thus clear that reservation in promotion is a statutory right. It is not a fundamental right. The right to promotion to a post or a class of posts depends upon the operation of the conditions of service. Article 16 (4A) read with Articles 14 and 16 (1) guarantees a right to promotion to Dalits and Tribes as fundamental right where they have not adequate representation consistently with the efficiency in administration. The Mandal's case, has prospectively overruled the ratio in Rangachari's case, i.e. directed the decision to be operative after 5 years from the date of the judgment, however before expiry

thereof, Article 16 (4A) has come into force from June, 1995. Therefore, the right to promotion continues as a constitutional guaranteed fundamental right to SC & ST. In adjusting the competing rights of the employees belonging to the general category on the other, balance is required to be struck by applying by egalitarian protective discrimination in favour of the Dalits and Tribes to give effect to the Constitutional goals, policy and objectives referred to hereinabove.

14. In the case of Post Graduate Institute of Medical Education and Research Vs. K.L. Narsimhan reported in 1997 (6) SCC 283, it has been held that when the roster is applied and rule of reservation is implemented it should be in the conformity with the roster. Appointment of the reserved candidates should always be against vacant posts earmarked in the roster for general candidates as well as reserved candidates. Only when the cadre consists of a single post, successive vacancies are treated by fiction of law, as vacant post and rule of rotation applies as per roster. This principle, guarantees equality of opportunity to the Dalits (SCs) and Tribes to occupy the higher echelons of service. Otherwise, it would be a case of total denial of opportunity to them violating Article 14, 15 (4), 16(1), 16(4) and 16 (4-A) read with 335 of the Constitution of India. So far as the duration of operation of the roster system is concerned, which is adopted by the Government of Gujarat by the resolution dated 17-5-97 which is effective till total number of seats reserved for each category of Scheduled Caste, Scheduled Tribes and Socially & Educationally backward class are not filled in as per the requisite percentage then in that case the roster system shall cease to operate any further. Thus, duration of that resolution is violative of the rule laid down by the Supreme Court in the case of Post Graduate Institute of Medical Education and Research Vs. K.L. Narsimhan(supra), wherein it has been held that once roster point exhausted it does not mean that the reservation should not be applied thereafter. The recycling of the roster is running like current account. As and when vacancy arises in accordance with roster point, the posts/vacancies would subsequently be filled up by appointments. It would be filled up by appointment. It would be a continuous process.

15. In the case of Superintending Engineer, Public Health, U. T. Chandigarh And Others Vs. Kuldeep Singh and Others, reported in AIR 1997 SUPREME COURT 2133, the Supreme Court has also directed for appropriate action to be taken against the officer who failed to perform the

constitutional duty entrusted with him which reads as under

"It would thus be clear that the petitioner was under constitutional duty coupled with power. Every public servant is a trustee of the society and in all facets of public administration, every public servant has to exhibit honesty, integrity, sincerity and faithfulness in implementation of the political, social, economic and constitutional policies to integrate the nation, to achieve excellence and efficiency in the public administration. A public servant entrusted with duty and power to implement constitutional policy under Art. 16(4), 16 (4A), 15 (4), 335 and all inter-related directive principles should exhibit transparency in implementation and of accountable (sic) for due effectuation of constitutional goals. Maintenance of the roster and strict adherence to it in accordance with the brochure issued by the Government of India in that behalf to implement the rule of reservation in promotion is the charge and trust put on public servants. The Constitutional has trusted the public servant as honest administrator to effectuate public policy and constitutional goals. The petitioner herein, has betrayed that trust and tended to frustrate the public policy. It is deductable from the facts that the petitioner failed to perform that constitutional duty. The Administrator of the Union Territory of Chandigarh should look into and take appropriate action against the concerned erring officers and report to compliance of the Registry of this Court within two months."

16. When the vacancies reserved for the Scheduled Castes and Scheduled Tribes are not filled up by roster promotion or by recruitment due to any reason, the Supreme Court has laid down rule for special recruitment to them in the case of Post Graduate Institute of Medical Education & Research Vs. K.L. Narsimhan (supra), wherein it has been held as under :

"There is no compulsion on the Government to fill up the vacancies stage by stage. There is also no prohibition on filling up back log vacancies by special recruitment. The special recruitment is not treated as routine recruitment in any year. The bar of 50% would apply only when general recruitment is made both for the general

as well as the reserved candidates in respect of current vacancies. However, when recruitment is made for selection and appointment of the Dalits (SCs) and Tribes, to the reserved back log vacancies, the normal run for recruitment is applicable. In stead of conducting the examinations repeatedly for different categories, there is no constitutional prohibition on filling up of the back log vacancies by a special recruitment in a single go. It is, therefore, held that special recruitment is not violative of the principle of carry forward within one year.

It is common knowledge that selections are not objectively being made to select the candidate belonging to the Dalits (SCs) and Tribes to fill up the vacancies reserved for them though qualified candidates are available to be promoted/appointed. This is done with a view to see that reserved vacancies are not filled up and the same are passed off as eligible candidates being not available, so as to ensure that carry forward vacancies either exceed 50% of the accumulated total vacancies or that the selection goes beyond three years. By this manipulation, reserved vacancies are dereserved. It would, therefore, be clear that the authorities should implement the excutive/legislative/constitutioal policy or principle in their true spirit, honestly, and sincerely to effectuate the policy, no mandamus or direction should be issued to dereserve the carry forward vacancies reserved for Dalits (SCs) and Tribes, nor should direction be given to fill up the reserved posts with general candidates.

17. Thus, the rule laid down by the Supreme Court an the constitutional policy guarantees fundamental right of reservation to the Scheduled Castes and Scheduled Tribes in the public post and it is required to be implemented strictly in accordance with the provisions of the law stated above. In case, carry forward vacancies could not be filled up to the Scheduled Castes and Scheduled Tribes, the State Government is required to make appointments by special recruitment to them which is not in violation of any constitutional or statutory provisions of the law.

18. It appears that the Government of Gujarat required a report from this Court to know what is the total strength of the officers and employees working in

the lower judiciary of the State of Gujarat and what is percentage of the officers and employees belonging to SC/ST actually working. This Court sent the following report (which came to be perused) showing the total officers and employees working on 31-12-1997 with the percentage of of representation of SC/ST.

Judicial Members : 309 ST 1.36% Prescribed percentage
not permissible.

Class II Officers: 288 ST 1.78% Prescribed percentage
not permissible.

Class III staff : 5225 Percentage not feasible.

Class IV staff : 1707 Percentage not feasible.

19. This report shows that prescribed percentage for members of SC/ST has not been made applicable to lower Judiciary i.e. Civil Judge (J.D.), Civil Judge (S.D.), Magistrate First Class, Assistant Judges, Additional District Judge/District Judges in the Districts and City Courts even to officers, Class-II and no reason has been given therefor. While in the Class-III and Class-IV staff, the SC/ST are not adequately represented hence their percentage to be mentioned has been avoided on the pretext that their percentage is not feasible. If it is tendency in one of the departments of the Government where the rule of law is guaranteed it can be imagined what would be the actual representation of SC/ST in other departments of the Government. The reservation to O.B.C. has also not been shown in the report sent to the Government of Gujarat.

20. From the facts and circumstances, it appears that the Government of Gujarat has not given proper representation of the Scheduled Castes and Scheduled Tribes and Other Backward Classes in the Government service. As such, the Government of Gujarat is required to fill up the back log vacancies in required percentage under the rules for SCs/STs by special direct recruitment in all the departments to make appointment by promotion on roster point in all the departments, where reservation in promotion is required under the rules on roster point.

21. Accordingly, in view of discussion above, this petition is allowed and the respondents are directed to promote the petitioner as Sr. Inspector of Factories

forthwith with all the consequential benefits with effect from 14-7-1988. The Government of Gujarat is further directed to sort out actual number of back log vacancies in required percentage under the rules for the Scheduled Castes and the Scheudled Tribes in each cadre separately of its all departments including lower Judiciary, to notify, advertise and fill up them by direct recruitment in Special drive for the Scheduled Castes and Scheduled Tribes and to make promotion on rostr point where promotion is required under the rules on roster point within six months. The reservation for OBC should also be given if permissible under the rules.

22. The Registrar of this Court is directed to forward a copy of this judgment to the Chief Secretary of the Government of Guajrat immediately for strict compliance.

23. Rules is made absolute to the aforesaid extent, with no order as to costs.

-0-0-0-0-0-